In re: DWIGHT L. LANE AND DARVIN R. LANE.
EAJA-FSA Docket No. 98-0002.
Decision and Order filed May 17, 2000.

Equal Access to Justice Act – Timely answer – Adequate answer – Commencement of adversary adjudication – Conclusion of adversary adjudication – Hourly rate for attorney fees – Sufficiency of application – Agent fees – Expert witness fees – Discharge of official duties.

The Judicial Officer reduced Hearing Officer Harry Iszler's awards to Equal Access to Justice Act (EAJA) Applicants from $213,997.77 to $55,396.60. The Judicial Officer found Respondent's answer was timely filed and met the requirements for an answer in 7 C.F.R. § 1.195(c). The Judicial Officer also held that, under the EAJA, an applicant may be awarded fees and other expenses incurred in connection with an adversary adjudication. However, the administrative process that precedes the agency decision, which is the basis for the adversary adjudication, is not part of the adversary adjudication. The Judicial Officer rejected Applicants' contention that the current $125-per-hour rate cap for attorney fees in the EAJA could be awarded to Applicants. Instead, the Judicial Officer found that the $75-per-hour rate cap in the EAJA (5 U.S.C. § 504(b)(1)(A)(ii) (1994)), at the commencement of the adversary adjudications for which Applicants sought EAJA awards, was the applicable maximum rate at which attorney fees could be awarded to Applicants. The Judicial Officer also rejected Applicants' contention that the $75-per-hour rate cap must be increased to reflect the change in the cost of living that has occurred since enactment of the EAJA in 1980. The Judicial Officer found 5 U.S.C. § 504(b)(1)(A)(ii) (1994) explicitly provides that attorney fees may not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living justifies a higher fee, and the USDA has not issued a regulation increasing the cap on the rate at which attorney fees may be awarded. Based on the legislative history applicable to the EAJA (H.R. Rep. No. 96-1418), the Judicial Officer held that no award can be made for agent fees because the record did not establish that Applicants' agent was a non-attorney representative in the adversary adjudications for which Applicants sought EAJA awards. However, the Judicial Officer did award Applicants' for fees incurred for their agent's services as an expert witness at the rate provided in 28 U.S.C. § 1821(b).

Duane G. Elness and William A. Robbins, Cavalier, ND, for Applicants.
Margit Halvorson Williams, St. Paul, MN, for Respondent.
Initial Decision and Order by Harry Iszler, Hearing Officer.
Decision and Order issued by William G. Jenson, Judicial Officer.

I. Introduction

Dwight Lane and Darvin Lane [hereinafter Applicants] instituted this administrative proceeding under the Equal Access to Justice Act (5 U.S.C. § 504) and the Procedures Relating to Awards Under the Equal Access to Justice Act in Proceedings Before the Department (7 C.F.R. §§ 1.180-.203) [hereinafter the EAJA Rules of Practice] by filing Equal Access to Justice Act Applications [hereinafter EAJA Applications] with the National Appeals Division, United States Department of Agriculture. Applicants seek fees and other expenses incurred in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W.

On September 25, 1995, and October 27, 1995, the National Appeals Division, citing proposed National Appeals Division Rules of Procedure (60 Fed. Reg.

27,044-49 (1995)), informed Applicants that their EAJA Applications could not be considered because the Equal Access to Justice Act is not applicable to National Appeals Division proceedings.

On December 29, 1995, the United States Department of Agriculture [hereinafter USDA] adopted the proposed National Appeals Division Rules of Procedure cited in the National Appeals Division's September 25, 1995, and October 27, 1995, letters to Applicants (60 Fed. Reg. 67,298-313 (1995)). Specifically, section 11.4 of the National Appeals Division Rules of Procedure states that the Equal Access to Justice Act does not apply to proceedings before the National Appeals Division, as follows:

> **§ 11.4 Inapplicability of other laws and regulations.**
>
> The provisions of the Administrative Procedure Act generally applicable to agency adjudications (5 U.S.C. 554, 555, 556, 557, & 3105) are not applicable to proceedings under this part. The Equal Access to Justice Act, as amended, 5 U.S.C. 504, does not apply to these proceedings. The Federal Rules of Evidence, 28 U.S.C. App., shall not apply to these proceedings.

7 C.F.R. § 11.4.

Applicants sought judicial review of 7 C.F.R. § 11.4 and the National Appeals Division's refusal to consider their EAJA Applications. The United States District Court for the District of North Dakota: (1) held the Equal Access to Justice Act applies to National Appeals Division proceedings; (2) held the provision in 7 C.F.R. § 11.4, which states the Equal Access to Justice Act is not applicable to National Appeals Division proceedings, is contrary to law; (3) held Applicants are entitled to fees under 5 U.S.C. § 504; and (4) remanded the matter to the National Appeals Division to determine the amount to award to Applicants. *Lane v. United States Dep't of Agric.*, 929 F. Supp. 1290 (D.N.D. 1996). USDA appealed and the United States Court of Appeals for the Eighth Circuit held the Equal Access to Justice Act is applicable to National Appeals Division proceedings. *Lane v. United States Dep't of Agric.*, 120 F.3d 106 (8th Cir. 1997). On September 29, 1997, pursuant to the mandate of the United States Court of Appeals for the Eighth Circuit, the United States District Court for the District of North Dakota remanded the case to the National Appeals Division to consider the merits of Applicants' EAJA Applications. *Lane v. United States Dep't of Agric.*, A2-95-166 (D.N.D. Sept. 29, 1997) (Order); *Lane v. United States Dep't of Agric.*, A2-95-148 (D.N.D. Sept. 29, 1997) (Order).

On December 2, 1997, National Appeals Division Hearing Officer Harry Iszler [hereinafter the Hearing Officer] conducted a hearing regarding Applicants' EAJA Applications in Grand Forks, North Dakota. William A. Robbins and Duane G.

Elness represented Applicants. Margit Halvorson[1] and Lynn E. Crooks represented the Farm Service Agency [hereinafter Respondent[2]], USDA. (Unofficial Transcript at 2-3.)

On February 20, 1998, the Hearing Officer issued an Equal Access to Justice Act Application Determination as to Dwight Lane, in which the Hearing Officer: (1) found Dwight Lane was the prevailing party in *In re Dwight Lane*, NAD Log No. 94001064W; (2) found Respondent's position in *In re Dwight Lane*, NAD Log No. 94001064W, was not substantially justified; and (3) awarded Dwight Lane $95,933.51 for fees and other expenses incurred in connection with *In re Dwight Lane*, NAD Log No. 94001064W, *In re Darvin Lane*, NAD Log No. 94000376W, and *In re Darvin Lane*, NAD Log No. 94000842W. On February 20, 1998, the Hearing Officer issued an Equal Access to Justice Act Application Determination as to Darvin Lane, in which the Hearing Officer: (1) found Darvin Lane was the prevailing party in *In re Darvin Lane*, NAD Log No. 94000376W, and *In re Darvin Lane*, NAD Log No. 94000842W; (2) found Respondent's positions in *In re Darvin Lane*, NAD Log No. 94000376W, and *In re Darvin Lane*, NAD Log No. 94000842W, were not substantially justified; and (3) awarded Darvin Lane $118,064.26 for fees and other expenses incurred in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W.

On March 24, 1998, Respondent appealed to the Judicial Officer. Applicants sought judicial review of USDA's authority to implement regulations providing for an administrative appeal of an Equal Access to Justice Act award. The United States District Court for the District of North Dakota found the Hearing Officer's February 20, 1998, Equal Access to Justice Act Application Determinations do not constitute final agency action ripe for judicial review. Applicants each filed a Request for Reconsideration, both of which the United States district court denied. *Lane v. United States Dep't of Agric.*, A2-95-166 (D.N.D. June 2, 1998) (Order); *Lane v. United States Dep't of Agric.*, A2-95-148 (D.N.D. June 2, 1998) (Order). Applicants appealed and the United States Court of Appeals for the Eighth Circuit

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[1]Subsequent to the December 2, 1997, hearing, Margit Halvorson changed her name to Margit Halvorson Williams.

[2]Applicants instituted the adversary adjudications, for which Applicants now seek Equal Access to Justice Act awards, against the Farmers Home Administration. Pursuant to section 226 of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6932), the functions of the Farmers Home Administration relevant to this proceeding were transferred to the Consolidated Farm Service Agency. Effective November 8, 1995, the Secretary of Agriculture renamed the Consolidated Farm Service Agency the Farm Service Agency (60 Fed. Reg. 56,392-465 (1995)). The term "Respondent" in this Decision and Order refers not only to the Farm Service Agency, but also to its predecessor agencies, the Farmers Home Administration and the Consolidated Farm Service Agency, where appropriate.

affirmed the United States District Court for the District of North Dakota. *Lane v. United States Dep't of Agric.*, 187 F.3d 793 (8th Cir. 1999).

On November 18, 1999, Applicants filed Memorandum in Support of Hearing Officer Decision. On December 16, 1999, Respondent filed Motion for Leave to File a Reply to Lanes' Memorandum in Support of Hearing Officer Decision; on January 4, 2000, Applicants filed Objection to Government's Motion for Leave to File a Reply to Lanes' Memorandum in Support of Hearing Officer Decision; and on January 6, 2000, I granted Respondent's request to file a reply to Applicants' Memorandum in Support of Hearing Officer Decision.

On January 27, 2000, Respondent filed Reply to Lanes' Memorandum in Support of Hearing Officer Decision. On February 17, 2000, Applicants requested an opportunity to file a response to Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision, which I granted on February 22, 2000.

On March 9, 2000, Applicants filed Lanes' Response to the Government's Reply requesting, *inter alia*, that I strike Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision. On May 8, 2000, the National Appeals Division transmitted the record of this proceeding to the Judicial Officer for decision and a ruling on Applicants' request that the Judicial Officer strike Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision.

II. Applicable Statutory Provision

5 U.S.C.:

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

. . . .

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

. . . .

§ 504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

(b)(1) For the purposes of this section—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated . . . .;

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise . . . .;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication; and

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based. . . .

. . . .

(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses.

5 U.S.C. § 504(a)(1)-(a)(3), (b)(1)(A)-(E), (c)(1) (1994).

III. Applicants' Motion to Strike Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision

Applicants request I strike Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision stating, as follows:

> The Supreme Court has admonished that the filing of a fee application under the EAJA should not occasion a second round of major litigation. It appears that the Government has chosen to ignore that caveat. The Reply that the Government has submitted is nothing more than a tardy pleading, serving mainly to delay an already lengthy proceeding, and should therefore be ordered stricken from the record.

Lanes' Response to the Government's Reply at 1 (emphasis in original).

I disagree with Applicants' contention that Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision serves mainly to delay this proceeding. Respondent states for the first time in this proceeding that "in the interests of bringing this long-standing case to a speedy resolution, [Respondent] will no longer challenge the findings that it was not substantially justified" (Reply to Lanes' Memorandum in Support of Hearing Officer Decision at 2). Respondent's concession greatly simplifies the issues in this proceeding and should expedite this proceeding.

Applicants correctly note that until Respondent's January 27, 2000, filing, Respondent consistently asserted that its positions in *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, were substantially justified, and that abandonment of this defense could have been accomplished other than by filing Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision (Lanes' Response to the Government's Reply at 4-5). I do not find Respondent's consistent assertion of a defense until January 27, 2000, or the method by which Respondent abandons that defense, a basis for striking Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision.

Therefore, Applicants' motion to strike Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision, is denied.

IV. Issues on Appeal

The Hearing Officer found: (1) *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, were adversary adjudications; (2) Darvin Lane was the prevailing party in *In re Darvin Lane*, NAD Log No. 94000376W, and *In re Darvin Lane*, NAD Log No. 94000842W, and Dwight Lane was the prevailing party in *In re Dwight Lane*, NAD Log No. 94001064W; (3) Respondent's positions in *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, were not substantially justified; (4) Applicants meet all conditions of eligibility for an award of fees and other expenses under the Equal Access to Justice Act; (5) Applicants did not engage in conduct which unduly and unreasonably protracted *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, or *In re Dwight Lane*, NAD Log No. 94001064W; and (6) there are no special circumstances that would make an Equal Access to Justice Act award for fees and other expenses incurred by Darvin Lane and Dwight Lane unjust (Equal Access to Justice Act Application Determination as to Darvin Lane at 8-9; Equal Access to Justice Act Application Determination as to Dwight Lane at 7).

Applicants request that I adopt the Hearing Officer's Equal Access to Justice

Act Application Determination as to Darvin Lane and Equal Access to Justice Act Application Determination as to Dwight Lane and that I find the Government's Response to Application for Relief Under the Equal Access to Justice Act [hereinafter Answer] was not timely filed and did not contain specific objections to Applicants' EAJA Applications (Memorandum in Support of Hearing Officer Decision at 1, 48-49).

Respondent concedes *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, were adversary adjudications. Moreover, Respondent does not challenge the Hearing Officer's finding that Darvin Lane was the prevailing party in *In re Darvin Lane*, NAD Log No. 94000376W, and *In re Darvin Lane*, NAD Log No. 94000842W, and Dwight Lane was the prevailing party in *In re Dwight Lane*, NAD Log No. 94001064W; or the Hearing Officer's finding that Respondent's positions in *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, were not substantially justified. Respondent states "[t]herefore, the only question remaining before the Judicial Officer is 'what are the reasonable fees that should be awarded to the Lanes?'" (Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision at 2.)

In light of Applicants' Memorandum in Support of Hearing Officer Decision and Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision, I find that the only issues remaining on appeal are: (1) the timeliness and adequacy of Respondent's Answer; and (2) the amount to award Applicants for fees and other expenses incurred by them in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W.

I find Respondent's Answer was timely filed and adequate. Moreover, I find the amounts the Hearing Officer awarded to Applicants for fees and other expenses incurred by them in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, error.

V. Timeliness of Respondent's Answer

Applicants contend that Respondent's Answer was not timely filed (Memorandum in Support of Hearing Officer Decision at 7-9). Section 1.195(a) of the EAJA Rules of Practice provides that within 30 days after service of an Equal Access to Justice Act application, agency counsel may file an answer, as follows:

§ 1.195 Answer to application.

(a) Within 30 days after service of an application, agency counsel may

> file an answer. If agency counsel fails to timely answer or settle the application, the adjudicative officer, upon a satisfactory showing of entitlement by the applicant, may make an award for the applicant's allowable fees and expenses.

7 C.F.R. § 1.195(a).

Darvin Lane's EAJA Application for fees and other expenses incurred in connection with *In re Darvin Lane*, NAD Log No. 94000376W, is dated February 16, 1995; Darvin Lane's EAJA Application for fees and other expenses incurred in connection with *In re Darvin Lane*, NAD Log No. 94000842W, is dated January 16, 1995; and Dwight Lane's EAJA Application for fees and other expenses incurred in connection with *In re Dwight Lane*, NAD Log No. 94001064W, is dated February 10, 1995. Applicants contend that Respondent was required to file its Answer no later than 30 days after the United States Court of Appeals for the Eighth Circuit held that the Equal Access to Justice Act applies to National Appeals Division proceedings. The Eighth Circuit decided *Lane v. United States Dep't of Agric.*, 120 F.3d 106 (8th Cir. 1997), on July 14, 1997, and based on Applicants' methodology for determining timeliness, Respondent was required to file its Answer no later than August 13, 1997.

Respondent contends it filed a timely Answer on November 14, 1997 (Reply to Lanes' Memorandum of Hearing Officer Decision at 9). In support of its contention, Respondent notes the United States Court of Appeals for the Eighth Circuit did not, as a consequence of its July 14, 1997, decision, remand the Equal Access to Justice Act proceeding to the National Appeals Division, but rather remanded the proceeding to the United States District Court for the District of North Dakota, the court from which the case had been appealed to the Eighth Circuit. The United States District Court for the District of North Dakota then remanded the case to the National Appeals Division, and on October 24, 1997, the Hearing Officer issued notices advising Applicants and Respondent that briefs, written arguments, additional documents, and a list of witnesses must be exchanged by November 17, 1997 (Notice of Hearing on Application for Fees and Expenses as to Dwight Lane; Notice of Hearing on Application for Fees and Expenses as to Darvin R. Lane). Pursuant to the Hearing Officer's October 24, 1997, notices, Respondent served Applicants' counsel with Respondent's Answer and filed its Answer with the United States District Court for the District of North Dakota on November 14, 1997. On November 19, 1997, Respondent filed its Answer with the Hearing Officer and again served its Answer on Applicants' counsel. (Reply to Lanes' Memorandum in Support of Hearing Officer Decision at 9.)

Applicants and Respondent agree that the time for filing Respondent's Answer did not begin to run from the date Respondent was served with the EAJA Applications, as provided in section 1.195(a) of the EAJA Rules of Practice (7 C.F.R. § 1.195(a)). Generally, I would disagree with Applicants and Respondent

and find that Respondent's Answer was due 30 days after Applicants' EAJA Applications were served on Respondent. However, given the history of this proceeding, I adopt the view shared by Applicants and Respondent that *Lane v. United States Dep't of Agric.*, 929 F. Supp. 1290 (D.N.D. 1996), and *Lane v. United States Dep't of Agric.*, 120 F.3d 106 (8th Cir. 1997), tolled the time for filing Respondent's Answer. However, I disagree with Applicants' contention that the time for filing Respondent's Answer runs from July 14, 1997, the date the United States Court of Appeals for the Eighth Circuit decided *Lane v. United States Dep't of Agric.*, 120 F.3d 106 (8th Cir. 1997).

As an initial matter, I conclude July 14, 1997, cannot be the operative date to determine the timeliness of Respondent's Answer because the United States District Court for the District of North Dakota did not remand the Equal Access to Justice Act proceeding to the National Appeals Division until September 29, 1997.[3] Moreover, the record reveals that, after the United States District Court for the District of North Dakota remanded the proceeding to the National Appeals Division, the Hearing Officer issued notices indicating Respondent's Answer was due November 17, 1997 (Notice of Hearing on Application for Fees and Expenses as to Dwight Lane; Notice of Hearing on Application for Fees and Expenses as to Darvin R. Lane). Respondent filed its Answer with the United States District Court for the District of North Dakota and served Applicants with its Answer on November 14, 1997. Respondent did not file its Answer with the Hearing Officer until November 19, 1997, 2 days after the date the Hearing Officer ordered Respondent to file its Answer. Nevertheless, the Hearing Officer appears to have accepted Respondent's Answer as having been timely filed (Equal Access to Justice Act Application Determination as to Dwight Lane at 2; Equal Access to Justice Act Application Determination as to Darvin Lane at 2-3). Therefore, I do not find that Respondent failed to file a timely Answer.

Moreover, even if I found Respondent's Answer was late-filed, my finding would have no effect on this proceeding. The EAJA Rules of Practice do not require a respondent to file an answer and do not provide any consequence for a late-filed answer. Instead, section 1.195(a) of the EAJA Rules of Practice (7 C.F.R. § 1.195(a)) provides agency counsel *may* file an answer and if agency counsel fails to file a timely answer, the adjudicative officer, upon a satisfactory showing of entitlement by the applicant, may make an award for the applicant's allowable fees and expenses. The EAJA Rules of Practice do not prohibit a party that has failed to file a timely answer to an Equal Access to Justice Act application from appealing an adjudicative officer's initial decision to the Judicial Officer.

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[3] *See Lane v. United States Dep't of Agric.*, A2-95-148 (Order) (Sept. 29, 1997) and *Lane v. United States Dep't of Agric.*, A2-95-166 (Order) (Sept. 29, 1997) (remanding the proceeding to the National Appeals Division for consideration on the merits of the Applicants' EAJA Applications).

VI. Adequacy of Respondent's Answer

Applicants contend that Respondent's Answer does not explain in detail objections to the awards requested in Applicants' EAJA Applications, as required by section 1.195(c) of the EAJA Rules of Practice (7 C.F.R. § 1.195(c)) and does not specifically identify the information sought in a further proceeding in accordance with section 1.199(b) of the EAJA Rules of Practice (7 C.F.R. § 1.199(b)) (Memorandum in Support of Hearing Officer Decision at 7-9, 48-49).

Section 1.195(c) of the EAJA Rules of Practice provides, as follows:

> **§ 1.195 Answer to application.**
>
> . . . .
>
> (c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceeding under § 1.199 of this part.

7 C.F.R. § 1.195(c).

Respondent's Answer explains Respondent's objections to the awards requested by Applicants, as follows:

> III. ATTORNEYS' FEES
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> FSA will present at the hearing specific objections to the statements presented by Lanes' attorneys and their ag credit counselor. However, its general objections to the statements can be grouped into several broad categories. First, there is no attempt to differentiate on the statements between work done for Darvin and Mavis Lane and work done for Dwight Lane, nor is there a sufficient description of the work done within the time noted to enable FSA to determine for what purpose the work was done. Second, if attorneys fees were allowed, they would only be allowed for work done in connection with the appeal itself, not for general work done in connection with other matters long prior to the appeal or not directly related to it. Third, there are some items which do not appear to have any legitimate connection with compensable services rendered in these cases. Fourth, although the attorneys may bill at an hourly rate of $95.00, they would only be able to recover at the hourly rate of $75 per hour under the Equal Access to Justice Act. Fifth, the attorneys must be able to show that their billings

> are "reasonable" and they have not done so. Sixth, there is "double billing" in some instances. The Appellants have the burden of proof on the attorneys' fees issue, and it will be difficult for them to meet in these cases, based on the statements themselves.

Answer at 16-17.

I find that Respondent's Answer complies with 7 C.F.R. § 1.195(c).

Section 1.199(a) and (b) of the EAJA Rules of Practice provides award determinations are ordinarily made on the basis of the written record, but further proceedings may be conducted, as follows:

> **§ 1.199 Further proceedings.**
>
> (a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses), pertinent discovery or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible. Whether the position of the Department was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.
>
> (b) A request that the adjudicative officer order further proceedings under this section shall identify specifically the information sought or the disputed issues, and shall explain specifically why the additional proceedings are necessary to resolve the issues.

7 C.F.R. § 1.199(a)-(b).

The record reveals Respondent did not request further proceedings under 7 C.F.R. § 1.199. Instead, the Hearing Officer, on his own initiative, ordered further proceedings (Notice of Hearings on Application for Fees and Expenses as to Dwight Lane; Notice of Hearings on Application for Fees and Expenses as to Darvin R. Lane). Respondent is not required by section 1.195(c) of the EAJA Rules of Practice (7 C.F.R. § 1.195(c)) to request further proceedings, and since Respondent did not request further proceedings, Respondent is not required by section 1.199(b) of the EAJA Rules of Practice (7 C.F.R. § 1.199(b)) to identify the information sought or the disputed issues or to explain why the additional proceedings are necessary to resolve the issues.

Therefore, I reject Applicants' contention that Respondent's Answer does not comply with 7 C.F.R. §§ 1.195(c) and 1.199(b).

Moreover, even if I found Respondent's Answer does not comply with 7 C.F.R. §§ 1.195(c) and 1.199(b), my finding would have no effect on this proceeding. The EAJA Rules of Practice do not require a respondent to file an answer and do not provide any consequence for a respondent's filing an answer that does not explain in detail objections to an Equal Access to Justice Act application or that does not specifically identify the information sought in a further proceeding. Instead, section 1.195(a) of the EAJA Rules of Practice (7 C.F.R. § 1.195(a)) provides agency counsel *may* file an answer and, if agency counsel fails to file a timely answer, the adjudicative officer, upon a satisfactory showing of entitlement by the applicant, may make an award for the applicant's allowable fees and expenses. The EAJA Rules of Practice do not prohibit a party that has failed to file a sufficient answer to an Equal Access to Justice Act application from appealing an adjudicative officer's initial decision to the Judicial Officer.

VII. Fees to Which Applicants Are Entitled Under the Equal Access to Justice Act

A. Commencement and Conclusion of the Adversary Adjudications

Respondent contends it denied loan servicing to Dwight Lane on November 22, 1993, and the Hearing Officer's award for fees and other expenses incurred by Dwight Lane prior to November 22, 1993, is error (Pet. for Review by Judicial Officer as to Dwight Lane at 11-12). Moreover, Respondent contends it denied a release of funds to Darvin Lane on November 14, 1993, and the Hearing Officer's award for fees and other expenses incurred by Darvin Lane prior to November 14, 1993, in connection with *In re Darvin Lane*, NAD Log No. 94000376W, is error. Finally, Respondent contends it denied loan servicing to Darvin Lane on November 18, 1993, and the Hearing Officer's award for fees and other expenses incurred by Darvin Lane prior to November 18, 1993, in connection with *In re Darvin Lane*, NAD Log No. 94000842W, is error. (Pet. for Review by Judicial Officer as to Darvin Lane at 15.)[4]

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[4]Respondent takes contradictory positions in Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision, stating on the one hand November 14, 1993, "is the earliest date for which Darvin Lane may claim EAJA fees" and on the other hand "the earliest date for which Darvin Lane may receive EAJA fees is January 21, 1994" (Reply to Lanes' Memorandum in Support of Hearing Officer Decision at 5-6). Respondent does not explain the basis for its contradictory positions with respect to the earliest date for which Darvin Lane "may claim EAJA fees." In any event, as discussed in this Decision and Order, *infra*, I find that only fees and expenses incurred by Applicants on and after November 14, 1993, in connection with *In re Darvin Lane*, NAD Log No. 94000376W, and on and after November 18, 1993, in connection with *In re Darvin Lane*, NAD Log No.

The Hearing Officer found Respondent notified Applicants of the denial of their application for loan servicing on November 22, 1993 (Equal Access to Justice Act Application Determination as to Darvin Lane at 4; Equal Access to Justice Act Application Determination as to Dwight Lane at 3). Nevertheless, the Hearing Officer's awards includes fees Applicants incurred for an agent beginning July 1, 1992, and fees Applicants incurred for attorneys beginning June 9, 1993 (Equal Access to Justice Act Application Determination as to Darvin Lane at 6-7; Equal Access to Justice Act Application Determination as to Dwight Lane at 5-6).

The Hearing Officer based Applicants' awards for agent fees beginning on July 1, 1992, on the following findings: (1) Respondent notified Applicants in 1992 that they had an opportunity to apply for loan servicing, that the application was very complex, and that Applicants may need assistance with the application; (2) Applicants secured the services of Mark Kreklau, an agricultural financial consultant, who assisted Applicants with the completion of their loan servicing applications; and (3) Applicants submitted their respective loan servicing applications to Respondent on July 7, 1992 (Equal Access to Justice Act Application Determination as to Darvin Lane at 4, 6; Equal Access to Justice Act Application Determination as to Dwight Lane at 3, 5). The Hearing Officer based Applicants' awards for attorney fees beginning on June 9, 1993, on the following findings: (1) Respondent notified Applicants on June 9, 1993, that their loan servicing applications would be reviewed by the Office of the General Counsel, USDA, because of past problems and discrepancies; and (2) it was reasonable for Applicants to obtain legal counsel once Respondent informed Applicants the Office of the General Counsel, USDA, would review their loan servicing applications (Equal Access to Justice Act Application Determination as to Darvin Lane at 4-5, 7; Equal Access to Justice Act Application Determination as to Dwight Lane at 3, 5-6).

I disagree with the Hearing Officer's determination that Applicants are entitled to fees for an agent from the approximate date the agent began assisting Applicants with the completion of their respective loan servicing applications. Moreover, I disagree with the Hearing Officer's determination that Applicants are entitled to attorney fees incurred from the date Respondent informed Applicants that the Office of the General Counsel, USDA, would be reviewing their loan servicing applications.

Under the Equal Access to Justice Act, an applicant may be awarded fees and other expenses incurred in connection with an adversary adjudication. However, the administrative process that precedes the agency decision, which is the basis for

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94000842W, may be awarded to Applicants.

the adversary adjudication, is not part of the adversary adjudication.[5] The fees and expenses Applicants incurred in connection with the completion of their loan servicing applications are not fees or other expenses incurred in connection with the adversary adjudications that are the subject of this Equal Access to Justice Act proceeding. Respondent's act of notifying Applicants that the Office of the General Counsel, USDA, would review Applicants' loan servicing applications does not constitute the commencement of an adversary adjudication under the Equal Access to Justice Act.

I conclude the adversary adjudication captioned *In re Dwight Lane*, NAD Log No. 94001064W, began no earlier than November 22, 1993, the date Respondent denied Dwight Lane's loan servicing application, and only fees and expenses incurred by Applicants on and after November 22, 1993, in connection with *In re Dwight Lane*, NAD Log No. 94001064W, may be awarded to Applicants.[6]

Moreover, I conclude the adversary adjudication captioned *In re Darvin Lane*, NAD Log No. 94000376W, began no earlier than November 14, 1993, the date Respondent denied a release of funds to Darvin Lane, and the adversary adjudication captioned *In re Darvin Lane*, NAD Log No. 94000842W, began no earlier than November 18, 1993, the date Respondent denied loan servicing to Darvin Lane. Therefore, only fees and expenses incurred by Applicants on and after November 14, 1993, in connection with *In re Darvin Lane*, NAD Log No. 94000376W, and on and after November 18, 1993, in connection with *In re Darvin Lane*, NAD Log No. 94000842W, may be awarded to Applicants.[7]

Respondent also contends the adversary adjudications for which Applicants seek fees and other expenses ended on December 2, 1994, when the National Appeals Division issued "final agency orders only reviewable by a United States District Court." Hence, Respondent concludes that the award to Applicants may not include an award for fees and other expenses incurred after December 2, 1994, except for fees for the preparation of Applicants' EAJA Applications. (Respondent's Reply to Lanes' Memorandum in Support of Hearing Officer Decision at 6.)

I agree with Respondent's contention that the conclusions of the adversary adjudications in question are marked by the issuance of final agency decisions. Moreover, I agree with Respondent that the Hearing Officer issued the final agency

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[5]*See generally Levernier Construction, Inc. v. United States*, 947 F.2d 497, 500-01 (Fed. Cir. 1991); *Weaver-Bailey Contractors, Inc. v. United States*, 24 Cl. Ct. 576, 581 (Cl. Ct. 1991); *Cox Construction Co. v. United States*, 17 Cl. Ct. 29, 33-34 (Cl. Ct. 1989); *United Construction Co. v. United States*, 11 Cl. Ct. 597, 599 (Cl. Ct. 1987).

[6]*See In re Ronald L. Wieczorek*, 57 Agric. Dec. 1149, 1157 (1998) (holding attorney fees incurred by the applicants from the date the respondent issued an adverse decision regarding the applicants' application were fees incurred in connection with the adversary adjudication).

[7]See note 6.

decision in *In re Darvin Lane*, NAD Log No. 94000842W, on December 2, 1994. However, I disagree with Respondent's contention that the other adversary adjudications in question were concluded on December 2, 1994. The Acting Director, National Appeals Division, issued a final agency decision in *In re Darvin Lane*, NAD Log No. 94000376W, on January 27, 1995 (Review Decision in *In re Darvin Lane*, NAD Log No. 94000376W, at last unnumbered page). Moreover, the date of the Hearing Officer's final agency decision in *In re Dwight Lane*, NAD Log No. 94001064W, is January 3, 1995.

Therefore, I conclude the Equal Access to Justice Act award to Applicants may only include fees and other expenses: (1) incurred by Applicants in connection with *In re Darvin Lane*, NAD Log No. 94000376W, from November 14, 1993, through January 27, 1995; (2) incurred by Applicants in connection with *In re Darvin Lane*, NAD Log No. 94000842W, from November 18, 1993, through December 2, 1994; and (3) incurred by Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W, from November 22, 1993, through January 3, 1995.

B. Maximum Hourly Rate for Attorney Fees

The Hearing Officer awarded Applicants attorney fees at the rate of $95 per hour based on his findings that Applicants' attorneys normally charge $95 per hour for legal services and $95 per hour is the prevailing rate in the community in which Applicants' attorneys ordinarily perform their services (Equal Access to Justice Act Application Determination as to Darvin Lane at 7-8; Equal Access to Justice Act Application Determination as to Dwight Lane at 6).

Respondent contends that "[t]he award of attorney's fees at the hourly rate of $95.00 per hour is improper" and that the hourly rate that may be awarded under the Equal Access to Justice Act is limited to $75 per hour (Pet. for Review by Judicial Officer as to Darvin Lane at 11-12; Pet. for Review by Judicial Officer as to Dwight Lane at 8).

Applicants contend that the hourly rate at which attorney fees should be awarded is the maximum rate provided under the Equal Access to Justice Act at the time of the award, not the maximum rate provided under the Equal Access to Justice Act at the time the attorney provided legal services, and request that I award Applicants attorney fees at a rate of $125 per hour (Memorandum in Support of Hearing Officer Decision at 25, 49).

I agree with Respondent that the award to Applicants for attorney fees incurred in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, is limited to $75 per hour. The adversary adjudications for which Applicants seek fees and other expenses commenced in November 1993 and concluded no later than January 27, 1995. During that time, the Equal Access to Justice Act provided a $75-per-hour rate cap on the award for attorney fees, as

follows:

> **§ 504. Costs and fees of parties**
>
> . . . .
> (b)(1) For the purposes of this section—
> (A) "fees and other expenses" includes . . . reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that . . . (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.)[.]

5 U.S.C. § 504(b)(1)(A) (1994).

Section 231(b)(1) of the Contract with America Advancement Act of 1996 amended 5 U.S.C. § 504(b)(1)(A)(ii) (1994) by increasing the rate cap on the award for fees of an attorney to $125 per hour (Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 231(b)(1), 110 Stat. 847, 863 (1996)). Section 233 of the Contract with America Advancement Act of 1996 limits the effect of section "331" of the Contract with America Advancement Act of 1996 to adversary adjudications commenced on or after March 29, 1996, the date of enactment of the Contract with America Advancement Act of 1996, as follows:

> **SEC. 233. EFFECTIVE DATE.**
>
> The amendments made by sections 331 and 332 shall apply to civil actions and adversary adjudications commenced on or after the date of enactment of this subtitle.

Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 233, 110 Stat. 847, 864 (1996).

Section "331" of the Contract with America Advancement Act of 1996 does not exist. The Law Revision Counsel of the House of Representatives, which supervises the preparation and publication of the United States Code, found the reference to "sections 331 and 332" error and stated that Congress probably intended to refer to "sections 231 and 232", as follows:

> EFFECTIVE DATE OF 1996 AMENDMENT
>
> Section 233 of Pub. L. 104-121, provided that: "The amendments made

> by sections 331 and 332 [probably means sections 231 and 232, amending this section and section 2412 of Title 28, Judiciary and Judicial Procedure] shall apply to civil actions and adversary adjudications commenced on or after the date of the enactment of this subtitle [Mar. 29, 1996]."

5 U.S.C. § 504 note (Supp. IV 1998) (brackets in original).

I conclude the reference to section "331" in section 233 of the Contract with America Advancement Act of 1996 is error, and I infer, based on the context in which the reference to section "331"is found, that Congress intended to refer to section "231" in section 233 of the Contract with America Advancement Act of 1996. Therefore, the rate cap on the award for attorney fees applicable to this Equal Access to Justice Act proceeding is the $75-per-hour maximum in 5 U.S.C. § 504(b)(1)(A)(ii) (1994).

Moreover, section 1.186(b) of the EAJA Rules of Practice provides that no award for the fee of an attorney may exceed $75 per hour, as follows:

> **§ 1.186 Allowable fees and expenses.**
>
> . . . .
>
> (b) No award for the fee of an attorney or agent under these rules may exceed $75.00 per hour. No award to compensate an expert witness may exceed the highest rate at which the Department pays expert witnesses, which is set out at §1.150 of this part. However, an award also may include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

7 C.F.R. § 1.186(b).

Section 1.187 of the EAJA Rules of Practice provides USDA may adopt regulations providing for the award of attorney fees at a rate higher than $75 per hour if warranted by an increase in the cost of living or by special circumstances, as follows:

> **§ 1.187 Rulemaking on maximum rates for attorney fees.**
>
> (a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), this Department may adopt regulations providing that attorney fees may be awarded at a rate higher than $75 per hour in some or all types of proceedings covered by this part. The Department will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

> (b) Any person may file with this Department a petition for rulemaking to increase the maximum rate for attorney fees in accordance with § 1.28 of this part. The petition should identify the rate the petitioner believes the Department should establish and the types of proceedings in which the rate should be used. It also should explain fully the reasons why the higher rate is warranted. The Department will respond to the petition within 60 days after it is filed, by initiating a rulemaking proceeding, denying the petition, or taking other appropriate action.

7 C.F.R. § 1.187.

USDA has not adopted a regulation providing for the award for the fees of an attorney in excess of $75 per hour. Therefore, under the Equal Access to Justice Act and the EAJA Rules of Practice, Applicants' award for the fees of their attorneys incurred in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, may not exceed $75 per hour, even if Applicants paid their attorneys more than $75 per hour for legal services.

Applicants contend that the $75-per-hour rate cap must be adjusted for the increase in the cost of living that has occurred since the enactment of the Equal Access to Justice Act in 1980 (Lanes' Response to the Government's Reply at 5). Relying on *Pierce v. Underwood*, 487 U.S. 552 (1988), Applicants contend that "the Supreme Court considers the cost of living increase to be a part of the rate cap itself, and, therefore, automatically operative factor that must be applied in every case" (Memorandum in Support of Hearing Officer Decision at 25).

I disagree with Applicants. As an initial matter, *Pierce v. Underwood*, 487 U.S. 552 (1988), does not explicitly state a cost-of-living factor is to be applied automatically in every case. Moreover, the statutory provision which was at issue in *Pierce v. Underwood* was section 204(a) of the Equal Access to Justice Act,[8] which applies to the award for fees and other expenses incurred in certain judicial proceedings. The statutory provision which is applicable in this proceeding is section 203(a)(1) of the Equal Access to Justice Act,[9] which applies to the award for fees and other expenses incurred in agency adversary adjudications. Section 204(a) of the Equal Access to Justice Act provides "attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living . . . justifies a higher fee." (28 U.S.C. § 2412(d)(2)(A)(ii) (1994).) Section 203(a)(1) of the Equal Access to Justice Act provides "attorney . . . fees

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[8]Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, § 204(a), 94 Stat. 2325, 2327-29 (28 U.S.C. § 2412).

[9]Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, § 203(a)(1), 94 Stat. 2325, 2325-27 (5 U.S.C. § 504).

shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living . . . justifies a higher fee." (5 U.S.C. § 504(b)(1)(A)(ii) (1994).) Therefore, I find *Pierce v. Underwood* inapposite. Moreover, I do not find that the rate cap on the award for attorney fees in 5 U.S.C. § 504(b)(1)(A)(ii) (1994) is automatically adjusted in each case to reflect an increase in the cost of living, as Applicants contend. Instead, 5 U.S.C. § 504(b)(1)(A)(ii) (1994) explicitly provides that attorney fees may not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living justifies a higher fee. USDA has not issued a regulation increasing the cap on the rate at which an Equal Access to Justice Act award may be made for attorney fees. Therefore, I find that Applicants' award for attorney fees incurred in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, cannot exceed $75 per hour.

C. Travel and Telephone Calls

Respondent contends that the Hearing Officer's award erroneously includes attorney fees which Applicants did not incur in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, or *In re Dwight Lane*, NAD Log No. 94001064W (Pet. for Review by Judicial Officer as to Darvin Lane at 16-17; Pet. for Review by Judicial Officer as to Dwight Lane at 12-13). Specifically, Respondent asserts the William A. Robbins Law Offices does not routinely bill clients for travel time and telephone calls.

The attorney billing statements attached to Applicants' EAJA Applications contain numerous entries marked "no charge" and generally these "no charge" entries are related to travel and telephone calls.

William A. Robbins testified that the entries marked "no charge" indicate that the William A. Robbins Law Offices billed Applicants at one-half the usual rate of $95 per hour, as follows:

> Halvorson: I direct your attention on that same billing statement to August 25th of 94 and you have indicated travel to Devils Lake from Cavalier. You have in parentheses no charge and then you put 4.0 hours.
>
> Robbins: That's right.
>
> Halvorson: So you intend to bill the government if you're able to for work that you would not ordinarily bill a client?
>
> Robbins: I put a no charge down on that but travel time is half-time. I adjust that when my statement comes up.

Halvorson: So no charge means half-time?

Robbins: (Undistinguishable). . our computer as you plug in, as you plug it in, it isn't set up for half rates. It's set up for full rates. And when it sees an hour it multiplies it by the full rate. The only way to keep it from multiplying by the full rate is to put no charge and to enter it separately manually as you get to the end of the statement because travel time is half rate and that's the way it's supposed to be billed. So if I were to put it in as four hours back and forth it would have billed it a[t] $95.00 an hour. Well that's not the proper way.

Halvorson: Is there any reason why you just didn't put half rate then instead of no charge?

Robbins: Well I don't know. Our computer can't handle half rate. So the secretary runs the time slips. They come back to me and I look at 'em, and if I see a no charge I look at it and then if it's travel time it's it's [sic] put in at half rate.

. . . .

Halvorson: In an attempt to clarify the explanation of why the no charge entries are showing. If you'll look at the statement from um, November 29th of 94.

Robbins: Yes, ma'am.

Halvorson: As I understand your testimony, it was that your computer system didn't allow you to enter half entries so you put no charge, then you added it manual [sic] back in at the end. Is that correct?

Robbins: That's I'm not I I [sic] put the time records down. I submit it at the end of each day. And then they do the time records. To my belief, that's how it's done because they come back to me and say how much time is spent on travel.

Halvorson: Well, if you'll look on the last entry on that invoice for November 29th of 94, it has total fees 175.90 hours and a total. So travel times are not added in there. They're not added in on any of your monthly invoices. You charge milage, but no travel time.

Robbins: OK.

Halvorson: So wouldn't that in fact indicate that you're trying to charge the government for something that you don't customarily bill your clients for?

Robbins: I don't think so.

Unofficial Transcript at 37-38, 40.

I do not find that the Hearing Officer erred when he awarded Applicants for fees incurred for the time Applicants' attorneys made telephone calls and traveled in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W. Despite the notations "no charge" on the billing statements, the record contains substantial evidence that the William A. Robbins Law Offices ordinarily billed its clients, and actually billed Applicants, at a rate of $47.50 per hour for some telephone calls and travel time. Therefore, I award Applicants $47.50 for each hour on the attorney billing statement entries marked "no charge" which apply to *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W.

D. Insufficient Itemized Statements

Respondent contends that the Hearing Officer erroneously "awarded fees based upon itemized statements which were insufficient to apprize the Hearing Officer of what work was actually done, whether it was done on behalf of Darvin Lane or Dwight Lane, and how that work related to the specific adversary adjudication" (Pet. for Review by Judicial Officer as to Darvin Lane at 17; Pet. for Review by Judicial Officer as to Dwight Lane at 14).

Respondent does not specifically identify which itemized statements are not sufficient to apprize the Hearing Officer of the work actually done, whether the work was done for Darvin Lane or Dwight Lane, and how the work reflected on the itemized statements relates to the specific adversary adjudication. I infer that Respondent contends that no award for fees and other expenses incurred in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, may be made to Applicants because the itemized statements are insufficient to support any Equal Access to Justice Act award.

I have carefully reviewed Applicants' Applications for Fees and Other Expenses and the accompanying billing statements and affidavits issued by Mark Kreklau, Dennis Biliske, Glenn Gilleshammer, and William A. Robbins and Duane G. Elness and find that they are generally sufficient to apprize the adjudicative officer of the service performed, the individual or individuals for whom the services were performed, and the relationship between the services performed and *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W,

and *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, while I find that Applicants are not entitled to the entire Equal Access to Justice Act award which they request and I disagree with the Hearing Officer's award to Applicants, I reject Respondent's contention that the Hearing Officer "awarded fees based upon itemized statements which were insufficient to apprize the Hearing Officer of what work was actually done, whether it was done on behalf of Darvin Lane or Dwight Lane, and how that work related to the specific adversary adjudication."

E. Award of Attorney Fees and Agent Fees

Respondent contends that the Hearing Officer's award for both attorney fees and agent fees incurred in connection with the adversary adjudications in question is error, as follows:

> 5 U.S.C. § 504 permits an award of attorney's fees **or** agent's fees in connection with an adversary adjudication, but not both. The intent of the Act is to enable the Appellant to be reimbursed for the services of an agent who represents him for purposes of an adversary adjudication, but the government is not compelled to pay the fees of both an attorney and an agent, or in this case, two attorneys and an agent. The fees of the agricultural consultant, if paid at all, should only have been paid for his services in testifying as an expert witness at the proceedings, and then only at the expert witness rate, not his customary hourly rate.

Pet. for Review by Judicial Officer as to Darvin Lane at 17-18; Pet. for Review by Judicial Officer as to Dwight Lane at 14. (Emphasis in originals.)

Applicants contend that the Equal Access to Justice Act allows the award for fees paid to an agent and an attorney, as follows:

> It is true and no doubt well known to the Hearing Officer, that Mr. Kreklau was not merely an expert witness, though he could certainly meet the criteria for being deemed an expert. Mr. Kreklau is, in fact, an agricultural credit counsellor with very broad and deep familiarity with farming, finance, and FmHA's rules and procedures, who formerly was employed by the State of North Dakota as an ag credit counsellor specialist. He had appeared before Mr. Iszler at many NAS and NAD hearings. He was not serving the Lanes as an expert witness, but as an agent with expertise in agricultural credit in their dealings with FmHA.
>
> Clearly, § 504 allows the adjudicative officer to compensate a prevailing party for the fees of an agent who is not an attorney and not an expert witness if he finds that those expenses were reasonable [sic] required to be

incurred. . . .

. . . .

Clearly, § 504 provides authority for compensation of an agent such as Mr. Kreklau, and Hearing Officer Iszler duly determined that certain of Mr. Kreklau's services were "reasonable expenses" incurred by Lanes in connection with the proceedings that FmHA's unreasonable actions had made necessary.

Memorandum in Support of Hearing Officer Decision at 20-21.

The Equal Access to Justice Act is a partial waiver of sovereign immunity and such a waiver must be strictly construed in favor of the United States.[10] The Equal Access to Justice Act provides that the fees and other expenses that may be awarded includes reasonable attorney or agent fees (5 U.S.C. § 504(b)(1)(A)).

The House Judiciary Committee Report on S. 265, from which the Equal Access to Justice Act was derived, makes clear that Congress understood *agent fees* to be fees for representation by a person who is not generally authorized to practice law, but who is permitted by the agency to represent persons who come before the agency, as follows:

Section 504(b) defines terms used in the section. The "fees and other expenses" which may be recovered under this section include the reasonable fees of attorneys, agents and expert witnesses as well as the reasonable cost of any report, study or test which is necessary to the party's case. An "agent fee" may be awarded for the services of a non-attorney where an agency permits such agents to represent parties who come before it.

H.R. Rep. No. 96-1418, at 14 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4993.[11]

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[10] *See Ardestani v. INS*, 502 U.S. 129, 137 (1991) (stating the Equal Access to Justice Act renders the United States liable for attorney fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity; any such waiver must be strictly construed); *Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 887 (8th Cir. 1995) (stating the Equal Access to Justice Act amounts to a partial waiver of the government's sovereign immunity and, as such, must be strictly construed in the government's favor); *Resolution Trust Corp. v. Eason*, 17 F.3d 1126, 1134 (8th Cir. 1994) (stating the Equal Access to Justice Act operates as a limited waiver of the United States' sovereign immunity; waivers of sovereign immunity must be strictly construed in the government's favor); *Premachandra v. Mitts*, 753 F.2d 635, 641 (8th Cir. 1985) (stating the Equal Access to Justice Act is a waiver of sovereign immunity and it must be strictly construed in the government's favor).

[11] *Accord Fanning, Phillips & Molnar v. West*, 160 F.3d 717, 721 (Fed. Cir. 1998); *Cook v. Brown*, 68 F.3d 447, 451 (Fed. Cir. 1995).

While Mr. Kreklau assisted Applicants with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, I do not award Applicants for fees incurred for Mr. Kreklau's services, except Mr. Kreklau's services as an expert witness, for two reasons. First, the record does not indicate that Mr. Kreklau provided services as Applicants' non-attorney representative in *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, or *In re Dwight Lane*, NAD Log No. 94001064W. Second, even if I found that Mr. Kreklau provided services as Applicants' non-attorney representative, I would not award Applicants for fees incurred for Mr. Kreklau's services because the fees are not reasonable and necessary. The record establishes that Applicants were represented in *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, by two able attorneys who specialize in agricultural law. I do not find agent fees for an agricultural financial consultant, in addition to the fees for two attorneys, are necessary and reasonable.

However, I find the award to Applicants may include fees incurred for Mr. Kreklau's services as an expert witness. The Equal Access to Justice Act provides that an award may include reasonable expenses of expert witnesses, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved (5 U.S.C. § 504(b)(1)(A)). Section 1.186(b) of the EAJA Rules of Practice provides for an award for fees incurred for expert witnesses, as follows:

> **§ 1.186 Allowable fees and expenses.**
>
> . . . .
>
> (b) . . . No award to compensate as expert witness may exceed the highest rate at which the Department pays expert witnesses, which is set out at § 1.150 of this part. However, an award also may include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

7 C.F.R. § 1.186(b).

Section 1.150 of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes provides that witnesses may be compensated, as follows:

> **§ 1.150 Fees of witnesses.**
>
> Witnesses summoned under these rules of practice shall be paid the same fees and mileage that are paid witnesses in the courts of the United States,

and witnesses whose depositions are taken, and the officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States. Fees shall be paid by the party at whose instances the witness appears or the deposition is taken.

7 C.F.R. § 1.150.

Attendance fees paid to witnesses in courts of the United States are limited by statute to $40 per day for each day's attendance, as follows:

§ 1821. Per diem and milage generally; subsistence

(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(2) As used in this section, the term "court of the United States" includes, in addition to the courts listed in section 451 of this title, any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States.

(b) A witness shall be paid an attendance fee of $40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

28 U.S.C. § 1821(a)-(b).

This statutory limitation on witness fees applies to expert witnesses, as well as fact witnesses.[12] Therefore, I award Applicants $40 per day for each day that Mr. Kreklau attended the hearings conducted in connection with the adversary adjudications in question and the Equal Access to Justice Act hearing.

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[12] *See West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 86 (1991) (stating that 28 U.S.C. §§ 1821(b) and 1920(3) define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further; when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limits of 28 U.S.C. § 1821(b), absent contract or explicit statutory authority to the contrary); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 444-45 (1987) (holding when a prevailing party seeks reimbursement for fees paid to its expert witnesses, a federal court is bound by the limits of 28 U.S.C. § 1821(b), absent contract or explicit statutory authority to the contrary); *Pinkham v. Camex, Inc.*, 84 F.3d 292, 295 (8th Cir. 1996) (per curiam) (holding expert witness fees in excess of the 28 U.S.C. § 1821(b) $40 limit are not recoverable, unless otherwise provided by law).

F. Mr. Kreklau's Itemized Statements

Respondent contends that the Hearing Officer erred by awarding fees incurred by Applicants based on billing statements that were not adequate to inform the Hearing Officer of the nature of the work performed by Mr. Kreklau and whether Mr. Kreklau's services were performed in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W (Pet. for Review by Judicial Officer as to Darvin Lane at 18-19; Pet. for Review by Judicial Officer as to Dwight Lane at 14-16).

As fully explicated in this Decision and Order, *supra*, my award to Applicants does not include fees incurred for Mr. Kreklau's services, except Mr. Kreklau's services as an expert witness. Therefore, the issue of the adequacy of Mr. Kreklau's billing statements to support an award, except an award for Mr. Kreklau's services as an expert witness, is moot. I find that the record is adequate to apprise me of Mr. Kreklau's services as an expert witness performed in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W.

G. Hearing Officer's Review of the Record

Respondent contends that the Hearing Officer failed to adequately review the William A. Robbins Law Offices' and agricultural financial consultant's billing statements and awarded fees requested by Applicants without eliminating unnecessary, double billed, and not customarily billed items (Pet. for Review by Judicial Officer as to Darvin Lane at 19-20; Pet. for Review by Judicial Officer as to Dwight Lane at 16-17).

An adjudicative officer has the duty to determine whether an applicant is entitled to an Equal Access to Justice Act award and the amount, if any, to which the applicant is entitled. Moreover, a respondent's failure to file an answer or request further proceedings does not relieve the adjudicative officer of this duty. (See 7 C.F.R. §§ 1.195(a), .199.)

While I find the Hearing Officer's awards to Applicants are error, I find no basis for Respondent's contention that the Hearing Officer failed to adequately review the record. The Hearing Officer states that his determinations are based on a review of the "Case Record, all applicable law and regulations and oral arguments" (Equal Access to Justice Act Application Determination as to Darvin Lane at 2; Equal Access to Justice Act Application Determination as to Dwight Lane at 2). The Hearing Officer's official duties with regard to Applicants' EAJA Applications include a careful review of those EAJA Applications to determine whether Applicants are eligible for the requested awards. There is a presumption of regularity with respect to official acts of public officers and in the absence of clear

evidence to the contrary, public officers are presumed to have properly discharged their official duties.[13]

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[13] *See United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating the fact that there is potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume that public officers properly discharge their duties); *INS v. Miranda,* 459 U.S. 14, 18 (1982) (per curiam) (stating although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP,* 247 U.S. 350 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Chaney v. United States*, 406 F.2d 809, 813 (5th Cir.) (stating the presumption that the local selective service board considered the appellant's request for reopening in accordance with 32 C.F.R. § 1625.2 is a strong presumption that is only overcome by clear and convincing evidence), *cert. denied*, 396 U.S. 867 (1969); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6th Cir. 1966) (stating without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); *Donaldson v. United States*, 264 F.2d 804, 807 (6th Cir. 1959) (stating the presumption of regularity supports official acts of public officers and in the absence of clear evidence to the contrary, courts presume they have properly discharged their duties); *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953) (stating a presumption of regularity attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951) (stating the presumption of regularity which attaches to official acts can be overcome only by clear evidence to the contrary); *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951) (holding duly appointed police officers are presumed to discharge their duties lawfully and that presumption may only be overcome by clear and convincing evidence); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948) (concluding an order of the Acting Rent Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or testimony to the contrary); *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 381-82 (9th Cir.) (stating the presumption of regularity applies to methods used by government chemists and analysts and to the care and absence of tampering on the part of postal employees), *cert. denied*, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939) (stating there is a strong presumption that public officers exercise their duties in accordance with law); *In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1079 (1997) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Kim Bennett*, 55 Agric. Dec. 176, 210-11 (1996) (stating that instead of presuming USDA attorneys and investigators warped the viewpoint of USDA veterinary medical officers, the court should have presumed that training of USDA veterinary medical officers was proper because there is a presumption of regularity with respect to official acts of public officers); *In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1053 (1995) (stating use of USDA employees in connection with a referendum on the continuance of the Dairy Promotion and Research Order does not taint the referendum process, even if petitioners show some USDA employees would lose their jobs upon defeat of the Dairy Promotion and Research Order, because a presumption of regularity exists with respect to official acts of public officers); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating without a showing that the official acts of the Secretary are arbitrary, his actions are presumed to be valid), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1494 (1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, USDA), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D.

An adjudicative officer who adequately reviews a record in a proceeding may nonetheless commit error. There is no evidence on the record which indicates that the Hearing Officer failed to adequately review the record. I do not infer that the Hearing Officer's erroneous awards to Applicants resulted from his failure to properly discharge his official duties.

H. Computation of Awards to Applicants

1. *In re Dwight Lane*, NAD Log No. 94001064W

In re Dwight Lane, NAD Log No. 94001064W, commenced November 22, 1993, and concluded January 3, 1995. The Affidavit of Appraiser Dennis Biliske and the attached January 28, 1994, receipt establishes Dennis Biliske billed Dwight Lane $150 for a chattel appraisal in connection with *In re Dwight Lane*, NAD Log No. 94001064W. The Affidavit of Attorneys which relates to *In re Dwight Lane*, NAD Log No. 94001064W, establishes that the William A. Robbins Law Offices billed Dwight Lane one-half of their total motel expenses, $74.54, related to *In re Dwight Lane*, NAD Log No. 94001064W (Affidavit of Attorneys ¶ 6). The Affidavit of Appraiser Glenn Gilleshammer and the attached billing statement establishes Mr. Gilleshammer billed Dwight Lane $1,000 for appraisal services, a court appearance, and research. Mr. Gilleshammer's billing statement indicates that only $650 of these fees were incurred after the commencement of *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, I find that Dwight Lane incurred expenses of $874.54 in connection with *In re Dwight Lane*, NAD Log No. 94001064W.

The record establishes that Mr. Kreklau attended the hearings conducted in connection with *In re Dwight Lane*, NAD Log No. 94001064W, on May 11, 1994, November 2, 1994, and November 8, 1994 (Appeal Decision in *In re Dwight Lane*, NAD Log No. 94001064W, at 1). On May 11, 1994, Mr. Kreklau also attended a hearing regarding *In re Darvin Lane*, NAD Log No. 94000842W. Therefore, I award only one-half of the witness attendance fee provided in 28 U.S.C. § 1821(b) to Dwight Lane for services provided by Mr. Kreklau as an expert witness on May 11, 1994. The record also establishes that Mr. Kreklau attended the December 2, 1997, Equal Access to Justice Act hearing conducted in connection with *In re Dwight Lane*, NAD Log No. 94001064W, *In re Darvin Lane*, NAD Log

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Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting respondent's theory that USDA shell egg graders switched cases of eggs to discredit respondent, in view of the presumption of regularity supporting acts of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

No. 94000376W, and *In re Darvin Lane*, NAD Log No. 94000842W (Unofficial Transcript). Therefore, I award one-half of the witness attendance fee provided in 28 U.S.C. § 1821(b) to Dwight Lane for services provided by Mr. Kreklau as an expert witness on December 2, 1997. Thus, I award Dwight Lane a total of $120 for Mr. Kreklau's services as an expert witness in connection with *In re Dwight Lane*, NAD Log No. 94001064W.

The Affidavit of Attorneys which relates to *In re Dwight Lane*, NAD Log No. 94001064W, establishes the William A. Robbins Law Offices billed each Applicant one-half of the attorney fees (Affidavit of Attorneys ¶ 5).

The December 21, 1993, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 45.6 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Six of the entries on the December 21, 1993, billing statement totaling 4.2 hours are identified as "no charge" for which I award Applicants $47.50 per hour. Four of the entries totaling 19 hours are identified as services regarding transcription of hearing tapes for which the William A. Robbins Law Offices billed Applicants at $20 per hour and for which I award Applicants $20 per hour. I award Applicants $75 per hour for the remaining 22.4 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the December 21, 1993, billing statement, I award Applicants $2,259.50.

The January 26, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 13 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Two of the entries on the January 26, 1994, billing statement totaling 4.4 hours are identified as "no charge" for which I award Applicants $47.50 per hour. I award Applicants $75 per hour for the remaining 8.6 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the January 26, 1994, billing statement, I award Applicants $854.

The February 16, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 23.1 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W. I award Applicants $75 per hour for the 23.1 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the February 16, 1994, billing statement, I award Applicants $1,732.50.

The March 23, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 34.1 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Two of the entries on the March 23, 1994, billing statement totaling 4.5 hours are identified as "no charge" for which I award Applicants $47.50 per hour. I award Applicants $75 per hour for the remaining 29.6 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the March 23, 1994, billing statement, I award Applicants $2,433.75.

The April 24, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 23.6 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W. One of the entries on the April 24, 1994, billing statement totaling 4.0 hours is identified as "no charge" for which I award Applicants $47.50 per hour. I award Applicants $75 per hour for the remaining 19.6 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the April 24, 1994, billing statement, I award Applicants $1,660.

The May 25, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 94.1 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Two of the entries on the May 25, 1994, billing statement totaling 4.6 hours are identified as "no charge" for which I award Applicants $47.50 per hour. I award Applicants $75 per hour for the remaining 89.5 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the May 25, 1994, billing statement, I award Applicants $6,931.

The June 22, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 57.1 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W. I award Applicants $75 per hour for the 57.1 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the June 22, 1994, billing statement, I award Applicants $4,282.50.

The July 27, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 82.8 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W.

Respondent contends that two of the entries on the July 27, 1994, billing statement do not relate to services performed by the William A. Robbins Law Offices in connection with *In re Dwight Lane*, NAD Log No. 94001064W, *In re Darvin Lane*, NAD Log No. 94000376W, or *In re Darvin Lane*, NAD Log No. 94000842W (Pet. for Review by Judicial Officer as to Darvin Lane at 15-16; Pet. for Review by Judicial Officer as to Dwight Lane at 12). Respondent contends that the June 21, 1994, entry that shows "items to be completed regarding Dakota Growers and Drayton stock" and one of the July 7, 1994, entries "showing a conference 'regarding FmHA refusal to give over June 14, 1994 letter to borrower'" do not relate to the adversary adjudications in question (Pet. for Review by Judicial Officer as to Darvin Lane at 16; Pet. for Review by Judicial Officer as to Dwight Lane at 12).

The June 21, 1994, entry indicates that the William A. Robbins Law Offices billed Applicants for .8 of an hour and that the legal services for which Applicants were billed include "phone conferences with Dwight regarding items to be completed regarding Dakota Growers and Drayton stock." This item on the June 21, 1994, entry does not appear to relate to *In re Dwight Lane*, NAD Log No.

94001064W, *In re Darvin Lane*, NAD Log No. 94000376W, or *In re Darvin Lane*, NAD Log No. 94000842W. However, the June 21, 1994, entry includes three other items which appear to relate to *In re Dwight Lane*, NAD Log No. 94001064W, *In re Darvin Lane*, NAD Log No. 94000376W, or *In re Darvin Lane*, NAD Log No. 94000842W. Therefore, since the item that is not related to the adversary adjudications in question represents one-fourth of the items in the June 21, 1994, entry, I do not award Applicants fees for .2 of the .8 of an hour billed for the items on the June 21, 1994, entry.[14]

One of the July 7, 1994, entries indicates that the William A. Robbins Law Offices billed Applicants for .6 of an hour and that the service for which Applicants were billed was a "[c]onference with Dwight regarding FmHA refusal to give over June 14, 1994, letter to borrower." The July 7, 1994, entry does not appear to relate to *In re Dwight Lane*, NAD Log No. 94001064W, *In re Darvin Lane*, NAD Log No. 94000376W, or *In re Darvin Lane*, NAD Log No. 94000842W. Therefore, I do not award Applicants fees for .6 of an hour billed in this July 7, 1994, entry.

Five of the entries on the July 27, 1994, billing statement totaling 11.1 hours are identified as "no charge" for which I award Applicants $47.50 per hour. I award Applicants $75 per hour for the remaining 70.9 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the July 27, 1994, billing statement, I award Applicants $5,844.75.

The August 23, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 45.9 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W.

Respondent contends that the August 23, 1994, billing statement contains entries that relate to meetings with United States Senator Kent Conrad and his administrative staff (Pet. for Review by Judicial Officer as to Darvin Lane at 16; Pet. for Review by Judicial Officer as to Dwight Lane at 12). The August 23, 1994, billing statement contains 10 entries that relate to conferences with Lynn Clancy of United States Senator Kent Conrad's office. However, only two of these 10 entries indicate that the William A. Robbins Law Offices billed Applicants for conferences with Lynn Clancy. One of the July 22, 1994, entries indicates that the William A. Robbins Law Offices billed Applicants for .4 of an hour and that the legal services for which Applicants were billed include a phone conference with Lynn Clancy. However, the July 22, 1994, entry in question includes one other item. Therefore,

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[14]The record does not establish that each of the four items included in the June 21, 1994, entry constitutes one-fourth of the .8 of an hour billed by the William A. Robbins Law Offices. Nevertheless, based on the record before me, I find no other means by which to determine the time billed by the William A. Robbins Law Offices for each of the items on the June 21, 1994, entry, than to assign equal time to each item. In those instances in which the William A. Robbins Law Offices' billing statements contain more than one item in an entry and the record does not reveal the time expended on each item in that entry, I assign equal time to each item.

since the item relating to a conference with Lynn Clancy represents one-half of the items in the July 22, 1994, entry, I do not award Applicants the fees for .2 of the .4 of an hour billed in the July 22, 1994, entry.[15] The August 9, 1994, entry indicates that the William A. Robbins Law Offices billed Applicants for phone conferences with Lynn Clancy. However, the August 9, 1994, entry in question includes three other items. Therefore, since the item relating to phone conferences with Lynn Clancy represents one-fourth of the items in the August 9, 1994, entry, I do not award Applicants the fees for 1.5 of the 5.9 hours billed in the August 9, 1994, entry.[16]

Eight of the entries on the August 23, 1994, billing statement totaling 7.9 hours are identified as "no charge" for which I award Applicants $47.50 per hour. I award Applicants $75 per hour for the remaining 36.3 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the August 23, 1994, billing statement, I award Applicants $3,097.75.

The September 22, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 61.3 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W.

Respondent contends the September 22, 1994, billing statement contains entries that relate to meetings with United States Senator Kent Conrad and his administrative staff (Pet. for Review by Judicial Officer as to Darvin Lane at 16; Pet. for Review by Judicial Officer as to Dwight Lane at 12). The September 22, 1994, billing statement contains three entries that relate to meetings or conferences with Lynn Clancy of United States Senator Kent Conrad's office. One of the August 25, 1994, entries indicates that the William A. Robbins Law Offices billed Applicants for 2.5 hours and that the legal services for which Applicants were billed include preparation for a meeting with Lynn Clancy. However, the August 25, 1994, entry in question includes one other item. Therefore, since the item relating to preparation for a meeting with Lynn Clancy represents one-half of the items in the August 25, 1994, entry, I do not award Applicants the fees for 1.3 hours of the 2.5 hours billed on the August 25, 1994, entry.[17] One of the September 1, 1994, entries indicates that the William A. Robbins Law Offices billed Applicants for a meeting with Lynn Clancy at United States Senator Kent Conrad's office. However, the September 1, 1994, entry in question includes one other item. Therefore, since the item relating to a meeting with Lynn Clancy represents one-half of the items billed on the September 1, 1994, entry, I do not award Applicants the

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[15]See note 14.

[16]See note 14.

[17]See note 14.

fees for 1.5 of the 3.0 hours billed on the September 1, 1994, entry in question.[18] Similarly, another September 1, 1994, entry indicates that the William A. Robbins Law Offices billed Applicants for a meeting with Lynn Clancy. However, the September 1, 1994, entry in question includes one other item. Therefore, since the item relating to a meeting with Lynn Clancy represents one-half of the items on the September 1, 1994, entry, I do not award Applicants the fees for 1.5 of the 2.9 hours billed on the September 1, 1994, entry in question.[19]

Respondent also contends the August 30, 1994, entry on the September 22, 1994, billing statement indicates that two attorneys representing Applicants conducted an office conference to draft a letter to Larry Jordan regarding the replacement of the Hearing Officer and it was not reasonable or necessary to have two attorneys attend this law office conference (Pet. for Review by Judicial Officer as to Darvin Lane at 17; Pet. for Review by Judicial Officer as to Dwight Lane at 13).

I agree with Respondent that the fee for two attorneys attending this office conference is not reasonable. Therefore, my award to Applicants only includes attorney fees incurred for 2.3 hours of legal services, rather than the 4.6 hours, which the William A. Robbins Law Offices billed Applicants for this office conference.

Nine of the entries on the September 22, 1994, billing statement totaling 17.7 hours are identified as "no charge" for which I award Applicants $47.50 per hour. I award Applicants $75 per hour for the remaining 37 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the September 22, 1994, billing statement, I award Applicants $3,615.75.

The November 29, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 175.9 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W.

Respondent contends that the November 29, 1994, billing statement contains entries dated October 12, 13, 17, 19, 25, 26, 28, 30, and 31, 1994, which "all seem to relate to settlement conferences unrelated to the adversary adjudication" (Pet. for Review by Judicial Officer as to Darvin Lane at 16; Pet. for Review by Judicial Officer as to Dwight Lane at 12). Except with respect to the entry dated October 30, 1994, I agree with Respondent that the entries cited by Respondent relate to settlement conferences unrelated to *In re Dwight Lane*, NAD Log No. 94001064W, *In re Darvin Lane*, NAD Log No. 94000376W, or *In re Darvin Lane*, NAD Log No. 94000842W. Therefore, my award to Applicants does not include attorney fees for 19.4 hours billed in the October 12, 13, 17, 19, 25, 26, 28, and 31,

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[18]See note 14.

[19]See note 14.

1994, entries on the November 29, 1994, billing statement.

Seventeen of the entries on the November 29, 1994, billing statement totaling 40.7 hours are identified as "no charge" for which I award Applicants $47.50 per hour. I award Applicants $75 per hour for the remaining 115.8 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the November 29, 1994, billing statement, I award Applicants $10,618.25.

The December 27, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 17.9 hours of legal services in connection with *In re Dwight Lane*, NAD Log No. 94001064W.

Two of the entries on the December 27, 1994, billing statement totaling 1 hour are identified as "no charge" for which I award Applicants $47.50 per hour. I award Applicants $75 per hour for the remaining 16.9 hours of legal services provided to Applicants in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, based on the December 27, 1994, billing statement, I award Applicants $1,315.

The Affidavit of Attorneys which relates to the Equal Access to Justice Act proceeding in connection with *In re Dwight Lane*, NAD Log No. 94001064W, and the attached December 3, 1997, billing statement states that the William A. Robbins Law Offices billed Dwight Lane $5,151.76 for 56.95 hours of legal services. Respondent contends the time the William A. Robbins Law Offices "spent researching and briefing the issue of cost-of-living adjustments to the hourly rate" was neither reasonable nor necessary (Letter dated December 10, 1997, from Margit Halvorson to Hearing Officer Iszler ¶ 3).

I agree with Respondent. One of the November 5, 1997, entries indicates that the William A. Robbins Law Offices billed Dwight Lane for 1.05 hours of legal services and that the legal services for which Dwight Lane was billed included research regarding the cost-of-living issue. However, this November 5, 1997, entry appears to include five other items. Therefore, since the item relating to the cost-of-living issue represents one-sixth of the items billed on the November 5, 1997, entry, I do not award Dwight Lane .18 of the 1.05 hours billed on the November 5, 1997, entry in question.[20] One of the November 7, 1997, entries indicates that the William A. Robbins Law Offices billed Dwight Lane for .45 hours for work on a preliminary brief regarding, *inter alia*, the cost-of-living issue. However, this November 7, 1997, entry indicates that the preliminary brief includes two other issues. Therefore, since the portion of the preliminary brief relating to the cost-of-living issue represents one-third of the issues addressed in the brief, I do not award Dwight Lane .15 of the .45 hours billed on the November 7, 1997, entry in

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[20]See note 14.

question.[21] The November 11, 1997, entry indicates that the William A. Robbins Law Offices billed Dwight Lane for .35 hours for a telephone conference in which, *inter alia*, the cost-of-living issue was discussed. However, the November 11, 1997, entry indicates that the telephone conference concerned four other issues. Therefore, since the portion of the telephone conference relating to the cost-of-living issue represents one-fifth of the issues discussed, I do not award Dwight Lane .07 of the .35 hours billed on the November 11, 1997, entry.[22]

Respondent states the December 3, 1997, billing statement contains numerous entries indicating "consultation with Mark Kreklau regarding preparation of the briefs." Respondent contends that no award should be made for these consultations because Applicants' "briefs did not contain statements of facts, but only legal arguments, about which Mr. Kreklau has no expertise, since he is not an attorney." (Letter dated December 10, 1997, from Margit Halvorson to Hearing Officer Iszler ¶ 5.)

I agree with Respondent. The November 3, 1997, entry, one of the November 5, 1997, entries, one of the November 7, 1997, entries, one of the November 10, 1997, entries, one of the November 12, 1997, entries, two of the November 24, 1997, entries, one of the November 25, 1997, entries, and one of the November 26, 1997, entries, indicate that the William A. Robbins Law Offices billed Dwight Lane for 5.75 hours of legal services and that the legal services for which Applicants were billed include consultation with Mr. Kreklau regarding the preparation of briefs. However, these entries appear to include 24 items, only 12 of which appear to be related to Mr. Kreklau's assistance with the preparation of the briefs. Therefore, since the items relating to Mr. Kreklau's assistance represent one-half of the items on the entries in question, I do not award Dwight Lane 2.88 of the 5.75 hours billed on these entries.[23]

I award Dwight Lane for the remaining 53.67 hours of legal services provided to him in connection with the Equal Access to Justice Act proceeding. Four of the entries on the December 3, 1997, billing statement totaling 4.55 hours are identified as "no charge" "travel," or "one-half rate" for which I award Dwight Lane $47.50 per hour. I award Dwight Lane $75 per hour for the remaining 49.12 hours of legal services provided to Dwight Lane in connection with the Equal Access to Justice Act proceeding. Therefore, based on the December 3, 1997, billing statement, I award Dwight Lane $3,900.13 for attorney fees incurred in connection with the Equal Access to Justice Act proceeding related to *In re Dwight Lane*, NAD Log No. 94001064W.

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[21]See note 14.

[22]See note 14.

[23]See note 14.

2. *In re Darvin Lane*, NAD Log No. 94000376W

In re Darvin Lane, NAD Log No. 94000376W, commenced November 14, 1993, and concluded January 27, 1995. The Affidavit of Attorneys which relates to *In re Darvin Lane*, NAD Log No. 94000376W, establishes that the William A. Robbins Law Offices billed each Applicant one-half of the attorney fees (Affidavit of Attorneys ¶ 5). The only billing statement issued by the William A. Robbins Law Offices to Applicants that contains fees for legal services during the period November 14, 1993, through January 27, 1995, is a March 23, 1994, billing statement.

The March 23, 1994, billing statement indicates that the William A. Robbins Law Offices billed Applicants for 9.3 hours of legal services. However, the March 9, 1994, entry for which Applicants request an award for .5 of an hour does not appear to relate to *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, or *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, I do not award Applicants the fees for .5 of an hour billed in the March 9, 1994, entry. Moreover, the March 14, 1994, entry for which Applicants seek an award for .4 of an hour for legal services includes three items for which Applicants were billed. One of these three items, the review of a letter regarding beet stock sale, does not appear to relate to *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, or *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, I do not award Applicants the fees for .1 of an hour of the .4 of an hour billed in this March 14, 1994, entry. I award Applicants $75 per hour for the 8.7 hours of legal services provided to Applicants in connection with *In re Darvin Lane*, NAD Log No. 94000376W. Therefore, based on the March 23, 1994, billing statement, I award Applicants $652.50.

The record also establishes that Mr. Kreklau attended the December 2, 1997, Equal Access to Justice Act hearing conducted in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W (Unofficial Transcript). Therefore, I award one-half of the witness attendance fee provided in 28 U.S.C. § 1821(b) to Darvin Lane for services provided by Mr. Kreklau on December 2, 1997. Since I award Darvin Lane for Mr. Kreklau's services as an expert witness in connection with *In re Darvin Lane*, NAD Log No. 94000376W, I do not also award Darvin Lane for Mr. Kreklau's identical services provided simultaneously on December 2, 1997, in connection with *In re Darvin Lane*, NAD Log No. 94000842W.

3. *In re Darvin Lane*, NAD Log No. 94000842W

In re Darvin Lane, NAD Log No. 94000842W, commenced November 18, 1993, and concluded December 2, 1994. The Affidavit of Appraiser Glenn

Gilleshammer establishes Mr. Gilleshammer billed Darvin Lane $1,000 for appraisal services, a court appearance, and research in connection with *In re Darvin Lane*, NAD Log No. 94000842W. Mr. Gilleshammer's affidavit indicates that Darvin Lane and Dwight Lane were each responsible for paying one-half of the appraisal, court appearance, and research expenses. Therefore, I award Darvin Lane and Dwight Lane $500 each for the expenses incurred for Mr. Gilleshammer's services in connection with *In re Darvin Lane*, NAD Log No. 94000842W.

Also included in Darvin Lane's EAJA Application relative to *In re Darvin Lane*, NAD Log No. 94000842W, is a receipt dated February 15, 1994, indicating that Darvin Lane paid Dennis Biliske $150 for a chattel appraisal completed on November 22, 1993. Therefore, I award Darvin Lane $150 for expenses incurred for Mr. Biliske's services in connection with *In re Darvin Lane*, NAD Log No. 94000842W.

The Affidavit of Attorneys which relates to *In re Darvin Lane*, NAD Log No. 94000842W, establishes that the William A. Robbins Law Offices billed Darvin Lane one-half of the total motel expenses, $74.54, related to *In re Darvin Lane*, NAD Log No. 94000842W (Affidavit of Attorneys ¶ 6).

Therefore, I find that Darvin Lane incurred expenses of $724.54 in connection with *In re Darvin Lane*, NAD Log No. 94000842W, and Dwight Lane incurred expenses of $500 in connection with *In re Darvin Lane*, NAD Log No. 94000842W.

The record establishes that Mr. Kreklau attended the hearings conducted in connection with *In re Darvin Lane*, NAD Log No. 94000842W, on February 24, 1994, and May 11, 1994 (Appeal Decision in *In re Darvin Lane*, NAD Log No. 94000842W, at 1). On May 11, 1994, Mr. Kreklau also attended a hearing regarding *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, I award only one-half of the witness attendance fee provided in 28 U.S.C. § 1821(b) to Darvin Lane for services provided by Mr. Kreklau as an expert witness on May 11, 1994. Thus, I award Darvin Lane a total of $60 for Mr. Kreklau's services as an expert witness in connection with *In re Darvin Lane*, NAD Log No. 94000842W.

The Affidavit of Attorneys which relates to *In re Darvin Lane*, NAD Log No. 94000842W, establishes that the William A. Robbins Law Offices billed each Applicant one-half of the attorney fees. However, the December 21, 1993, through December 27, 1994, billing statements related to *In re Darvin Lane*, NAD Log No. 940000842W, are identical to the December 21, 1993, through December 27, 1994, billing statements related to *In re Dwight Lane*, NAD Log No. 94001064W. As discussed in this Decision and Order, *supra*, I award Applicants attorney fees based on the billing statements in connection with *In re Dwight Lane*, NAD Log No. 94001064W. Therefore, I do not award Applicants for fees reflected on these same billing statements in connection with *In re Darvin Lane*, NAD Log No. 94000842W.

The Affidavit of Attorneys which relates to the Equal Access to Justice Act

proceeding in connection with *In re Darvin Lane*, NAD Log No. 94000842W, and the attached December 3, 1997, billing statement states that the William A. Robbins Law Offices billed Darvin Lane $5,151.76 for 56.95 hours of legal services. Respondent contends the time the William A. Robbins Law Offices "spent researching and briefing the issue of cost-of-living adjustments to the hourly rate" was neither reasonable nor necessary (Letter dated December 10, 1997, from Margit Halvorson to Hearing Officer Iszler ¶ 3).

I agree with Respondent. One of the November 5, 1997, entries indicates that the William A. Robbins Law Offices billed Darvin Lane for 1.05 hours of legal services and that the legal services for which Darvin Lane was billed included research regarding the cost-of-living issue. However, this November 5, 1997, entry appears to include five other items. Therefore, since the item relating to the cost-of-living issue represents one-sixth of the items billed on the November 5, 1997, entry, I do not award Darvin Lane .18 of the 1.05 hours billed on the November 5, 1997, entry in question.[24] One of the November 7, 1997, entries indicates that the William A. Robbins Law Offices billed Darvin Lane for .45 hours for work on a preliminary brief regarding, *inter alia*, the cost-of-living issue. However, this November 7, 1997, entry indicates that the preliminary brief includes two other issues. Therefore, since the portion of the preliminary brief relating to the cost-of-living issue represents one-third of the issues addressed in the brief, I do not award Darvin Lane .15 of the .45 hours billed on the November 7, 1997, entry in question.[25] The November 11, 1997, entry indicates that the William A. Robbins Law Offices billed Darvin Lane for .35 hours for a telephone conference in which, *inter alia*, the cost-of-living issue was discussed. However, the November 11, 1997, entry indicates that the telephone conference concerned four other issues. Therefore, since the portion of the telephone conference relating to the cost-of-living issue represents one-fifth of the issues discussed, I do not award Darvin Lane .07 of the .35 hours billed on the November 11, 1997, entry.[26]

Respondent states the December 3, 1997, billing statement contains numerous entries indicating "consultation with Mark Kreklau regarding preparation of the briefs." Respondent contends that no award should be made for these consultations because Applicants' "briefs did not contain statements of facts, but only legal arguments, about which Mr. Kreklau has no expertise, since he is not an attorney." (Letter dated December 10, 1997, from Margit Halvorson to Hearing Officer Iszler ¶ 5.)

I agree with Respondent. The November 3, 1997, entry, one of the November 5,

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[24]See note 14.

[25]See note 14.

[26]See note 14.

1997, entries, one of the November 7, 1997, entries, one of the November 10, 1997, entries, one of the November 12, 1997, entries, two of the November 24, 1997, entries, one of the November 25, 1997, entries, and one of the November 26, 1997, entries, indicate that the William A. Robbins Law Offices billed Darvin Lane for 5.75 hours of legal services and that the legal services for which Darvin Lane was billed include consultation with Mr. Kreklau regarding the preparation of briefs. However, these entries appear to include 24 items, only 12 of which appear to be related to Mr. Kreklau's assistance with the preparation of the briefs. Therefore, since the items relating to Mr. Kreklau's assistance represent one-half of the items on the entries in question, I do not award Darvin Lane 2.88 of the 5.75 hours billed on these entries.[27]

I award Darvin Lane for the remaining 53.67 hours of legal services provided to him in connection with the Equal Access to Justice Act proceeding in connection with *In re Darvin Lane*, NAD Log No. 94000842W. Four of the entries on the December 3, 1997, billing statement totaling 4.55 hours are identified as "no charge" "travel," or "one-half rate" for which I award Darvin Lane $47.50 per hour. I award Darvin Lane $75 per hour for the remaining 49.12 hours of legal services provided to Darvin Lane in connection with the Equal Access to Justice Act proceeding. Therefore, based on the December 3, 1997, billing statement, I award Darvin Lane $3,900.13 for attorney fees incurred in connection with the Equal Access to Justice Act proceeding related to *In re Darvin Lane*, NAD Log No. 94000842W.

VIII. Findings of Fact and Conclusions of Law

1. Darvin Lane is a resident of North Dakota. At all times material to this proceeding, Darvin Lane had net worth of less than $2,000,000.

2. Dwight Lane is a resident of North Dakota. At all times material to this proceeding, Dwight Lane had a net worth of less than $2,000,000.

3. *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, were adversary adjudications.

4. Darvin Lane was the prevailing party in *In re Darvin Lane*, NAD Log No. 94000376W, and *In re Darvin Lane*, NAD Log No. 94000842W.

5. Dwight Lane was the prevailing party in *In re Dwight Lane*, NAD Log No. 94001064W.

6. Respondent's positions in *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, were not substantially justified.

7. Darvin Lane and Dwight Lane meet all conditions of eligibility for an

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[27]See note 14.

award of fees and other expenses under the Equal Access to Justice Act (5 U.S.C. § 504).

8. Darvin Lane and Dwight Lane have not unduly or unreasonably delayed or protracted *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, or *In re Dwight Lane*, NAD Log No. 94001064W.

9. There are no special circumstances that would make the award of fees to Darvin Lane or Dwight Lane unjust.

10. Darvin Lane incurred fees and other expenses in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, to which he is entitled to an award under the Equal Access to Justice Act totaling $27,353.30.

11. Dwight Lane incurred fees and other expenses in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W, to which he is entitled to an award under the Equal Access to Justice Act totaling $28,043.30.

IX. Order

1. Pursuant to the Equal Access to Justice Act, Darvin Lane is awarded $27,353.30 for fees and expenses incurred in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W. Darvin Lane shall seek payment of this Equal Access to Justice Act award and Respondent shall pay this Equal Access to Justice Act award in accordance with section 1.203 of the EAJA Rules of Practice (7 C.F.R. § 1.203).[28]

2. Pursuant to the Equal Access to Justice Act, Dwight Lane is awarded $28,043.30 for fees and expenses incurred in connection with *In re Darvin Lane*, NAD Log No. 94000376W, *In re Darvin Lane*, NAD Log No. 94000842W, and *In re Dwight Lane*, NAD Log No. 94001064W. Dwight Lane shall seek payment of

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[28]Section 1.203 of the EAJA Rules of Practice provides for payment of an Equal Access to Justice Act award, as follows:

> **§ 1.203 Payment of award.**
>
> An applicant seeking payment of an award shall submit to the head of the agency administering the statute involved in the proceeding a copy of the final decision of the Department granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

7 C.F.R. § 1.203.

this Equal Access to Justice Act award and Respondent shall pay this Equal Access to Justice Act award in accordance with section 1.203 of the EAJA Rules of Practice (7 C.F.R. § 1.203).[29]

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[29]See note 28.